IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1822

JAIME VILA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JAIME VILA,
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-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on the 1st day of May, 1979, which affirmed a judgment of conviction heard with a jury before the Honorable Pierre N. Leval in the United States District Court for the Southern District of New York for violation of:

(a) Title 21 U.S.C. §846 (Conspiracy to possess and distribute cocaine)

(b) Title 21 U.S.C. §841; §841(b)(1)(A) and 18 U.S.C. §2 (Possession with intent to distribute cocaine and distribution of cocaine)

Appellant was sentenced and is presently serving concurrent terms of 15 years to be followed by special parole of 20 years and a $20,000.00 fine on each count.

THE OPINION BELOW

The case was affirmed in a written opinion by the United States Court of Appeals for the Second Circuit. This case has not yet been reported. A copy of the opinion affirming the conviction is attached herein.

JURISDICTION

The Judgement of the United States Court of Appeals for the Second Circuit was entered on May 1, 1979. A request has been made for an extension of time to file this petition. Jurisdiction of this Court is invoked under Title 28, §1241(1), United States Code.

QUESTIONS PRESENTED

1. Did the failure of the Government to arraign the Petitioner promptly warrant a dismissal of the indictment?
2. Did the failure of the Government to produce a key witness deprive Petitioner of his right of confrontation?
3. Did the Judge's giving of a second "Allen" Charge render the verdict of the jury coerced as to deprive the petitioner of a fair trial?
4. Is an indictment based solely upon hearsay without justification, so defective as to warrant a dismissal of said indictment?
5. Does the misclassification of cocaine constitute a violation of due process of law as applied to the petitioner?

STATUTES INVOLVED

21 U.S.C. 841

"(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

"(b) Except as otherwise provided in section 405 (21 U.S.C. §845), any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(a) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offens punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, Marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(b) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after

one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole of at least 4 years in addition to such term of imprisonment."

21 U.S.C. 846

"Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P.C. 91-513, Title II, Part D, §406, 84 Stat. 1265)."

STATEMENT OF THE CASE

A. The Indictment

On October 23, 1977 Indictment No. 77 Cr 767 was filed, charging Jaime Vila and eight co-defendants with conspiracy to distribute of one and one-half kilograms of Cocaine on August 10, 1978 (Count 2).

On January 24, 1978 superceding Indictment No. S 77 767 was filed accusing the same nine defendants with the same criminal violations.

B. Motions Prior to Trial

The pertinent motions filed prior to trial were as follows:

(a) Defendant Vila moved prior to trial by written papers, to dismiss the indictment on the grounds of a denial of his right to a "speedy trial" due to the Government's 82 day delay in bringing him from California to New York. Said motion was denied orally from the bench.

(b) Defendant Vila also moved for among other things, a dismissal of the indictment upon the grounds that the criminal classification of cocaine as a narcotic drug is without sufficient rationale and would deprive the defendant of liberty without due process of law, or alternately, that the Court order that the charges be punishable only under the provisions applicable to non-narcotics pursuant to 28 U.S.C. §841(b)(1)(B).

(c) During the trial defendant Luis Hernandez orally moved for a dismissal of the indictment upon the grounds that the indictment was wholly supported upon hearsay testimony without justification therefor. Said motion was orally denied from the bench.

With the permission of the Court, all motions made by any of the defendants were deemed joined in by the other defendants.

C. Facts Below

On October 23, 1977 the defendant Jaime Vila, and eight co-defendants were charged in indictment No. 77 Cr 767 with conspiracy to sell cocaine (Count 1) and with participating in the distribution of one and one-half kilograms of cocaine on August 10, 1978 (Count 2).

Defendant Vila was arrested pursuant to this indictment in Los Angeles, California on November 14, 1977 and held in lieu of one million dollars bail. He appeared at a Removal Hearing in the United States District Court in Los Angeles, California on December 9, 1977 and was ordered removed to the United States District Court for the Southern District of New York. *82*

days after his arrest, and on February 2, 1978, Jaime Vila was arraigned in the United States District Court for the Southern District of New York, the Government offering an excuse that it could not transport the defendant by commercial airline. However, it must be noted that immediately after the trial of this indictment, the defendant was flown by the Government *on a commercial airline* to Los Angeles to stand trial on separate charges there, thus negating the Government's argument that it could not bring the defendant Vila to New York rapidly to afford him his right to a speedy trial.

The trial of this action commenced on March 6, 1978 and was completed on May 19, 1978 wherein the jury found the defendant Vila, and co-defendants Luis Hernandez and Narcissus Guzman guilty of both counts charged in the indictment and acquitted all the remaining defendants on trial.

At the trial with respect to the conspiracy count, other than Joint Task Force Agents, the prime witness against the defendant was an unindicted co-conspirator, to wit: Sonny Perlman. The most crucial evidence with respect to the conspiracy were taped conversations allegedly made by a paid informant, Jorge Rubio-Fernandez, who allegedly conversed with most of the members of the alleged conspiracy. Rubio-Fernandez was under the control of the United States Government by virtue of its Federal Marshal's Witness Protection Program and it was not until the trial was well under way that the Government announced that he had disappeared. Objections were made to the admissibility of the taped recordings containing the voice of Rubio-Fernandez on one hand and some of the defendants on the other hand. Said objections were overruled.

Throughout the trial the Government witnesses were asked on cross-examination as to whether they appeared before the Grand Jury, to which they all replied in the negative.

During the trial the defendant moved for a mis-trial or in the alternative to dismiss the indictment upon the grounds that the indictment was based wholly upon hearsay testimony without sufficient reason being given therefor. Said motions were denied.

The above constitutes the essential points, both pre-trial and during the trial which it is respectfully urged gives grounds for the appeal herein.

By reason of the foregoing facts and the points discussed herein, the conviction below should be reversed.

REASONS FOR GRANTING WRIT

THE FAILURE TO ARRAIGN THE DEFENDANT AFTER HIS ARREST CONSTITUTES A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL.

The defendant was arrested on November 14, 1977 in Los Angeles, California, by agents of the Drug Enforcement Administration. Defendant exercised his rights to a removal of proceeding, and on or about December 9, 1977, the United States District Court for the Southern District of California ordered the defendant removed.

Thereafter, the defendant remained in the custody of the Government and, through no fault of his own, was not brought before the United States District Court for the Southern District of New York for arraignment until February 2, 1977, some 82 days after his arrest and 54 days after removal was ordered by the United States District Court in Los Angeles. The Government, in its attempt to explain the delay in transporting the defendant from Los Angeles to New York, stated it could not transport the defendant by commercial airlines from Los Angeles to New York. However, the dsefendant was transferred by commercial airlines from Los Angeles to Levenworth, Kansas, where he was incarcerated in the U.S. Penitentiary and then taken on a circuitous trip throughout the United States until he finally arrived in New York.

The *day after the completion of the New York trial the dsefendant was flown by commercial airline to Los Angeles to stand trial there* in complete contradiction of the Government's representations to the Court that it could not transport the

defendant expeditiously from Los Angeles to New York by commercial airlines.

It is respectfully submitted that these actions on the part of the Government (a) delayed the defendant's right to a speedy trial, as guaranteed by the Sixth Amendment to the United States Constitution; (b) violated the mandates of the Speedy Trial Act of 1974, 18 U.S.C. §3161 et al; and (c) denied the defendant the right to effective assistance of counsel.

A. The defendant's Right to a Speedy Trial Was Denied.

The right to a speedy trial in federal criminal prosecutions is secured by the Sixth Amendment which provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "
> U.S. Const., Amend. 6

This right to a speedy trial is a fundamental right, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and serves various purposes. For example, the right to a speedy trial protects the accused, if held in jail to await trial, against prolonged imprisonment and protects the accused's right to prompt inquiry into the criminal charges. See, e.g. *Dickey v. Florida*, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970). In addition to the general concern that all accused persons should be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. See *Barker v. Wingo, supra.*

It is clear that a defendant's constitutional rights have been denied if he is not brought to trial within such period of time as is reasonable under the circumstances and the delay is due to neglect or laches of the prosecution. It is respectfully submitted that the delay in arraigning the defendant was unreasonable under the circumstances. The Government has failed to produce any explanation as to why the defendant could not be

transported by commercial airline all the way to New York. The only possible explanation is neglect or laches. Consequently, it is respectfully submitted that the trial court erred in refusing to dismiss the indictment for failure to guarantee the defendant's rights under the Sixth Amendment.

B. The Provisions of the Speedy Trial Act Were Not Complied With.

18 U.S.C. §3161(c) provides:

> The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within 10 days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Clearly, the rules of the Speedy Trial Act of 1974 were violated. Moreover, the reason for the delay in arraignment does not fall under any of the "excluded delays" under 18 U.S.C. §3161(h).

The Second Circuit has ruled in *United States v. Didier*, 542 F. 2d 1182 (2d Cir. 1976), that the responsibility for speedy trial enforcement rests primarily on district courts and on the Government and not on the defendant. This responsibility was not met. The reason for the delay was deliberate procrastination or negligent inaction on the part of the government which deprived defendant of an adequate opportunity to prepare his defense by a prompt inquiry into the criminal charges. *United States v. Lane*, 561 F. 2d 1075 (2d Cir. 1977). Consequently, it is respectfully submitted that the trial court erred in refusing to dismiss the indictment for failure to comply with the provisions of the Speedy Trial Act.

C. The Defendant was denied Effective Assistance of Counsel Because of the Denial of the Right to Adequately Prepare A Defense.

The Sixth Amendment to the United States Constitution Guarantees an accused the right to effective assistance of counsel. The Fifth Amendment to the United States Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law, and to the extent that an accused is deprived of adequate time for the preparation of his defense, the defendant is held to be deprived of his rights without due process of law. *Fields v. Pegron,* 375 F.2d 624 (4th Cir. 1977).

An accused cannot be deprived of his right to have an adequate opportunity to prepare his defense. *United States v. Didier,* 542 F. 2d 1182 (2d Cir. 1976). It is respectfully submitted that this opportunity arose immediately after the defendant's arrest in Los Angeles because it is at that time that the accused must be afforded the right to a prompt inquiry into the criminal charges. *See, e.g. Dickey v. Florida,* 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970). Consequently, it is respectfully submitted that a new trial should be ordered.

THE FAILURE BY THE GOVERNMENT TO PRODUCE A KEY WITNESS DENIED DEFENDANT HIS RIGHT OF CONFRONTATION.

It is respectfully submitted that the dsefendant is entitled to a new trial because the Government failed to produce Jorge Rubi-Fernandez, the paid informant for the Government, or ascertain his whereabouts. This failure to produce Mr. Rubio-Fernandez: (a) deprived the defendant of his right of confrontation, as guaranteed by the Sixth Amendment to the United States Constitution; and deprived the defendant of the right to prepare his defense of entrapment, in violation of the Fifth Amendment's guarantee of due process of law; and (b) violated

18 U.S.C. §2511, prohibiting the interception and disclosure of wire or oral communications, because the Government failed to establish that either the defendant or Rubio-Fernandez consented to the recording of their telephone conversations, evidence of which was introduced at trial.

A. The defendant was Denied His Right of Confrontation and the Right to Prove a Defense.

The right of the accused to be confronted by his accusers before the tribunal which pronounces upon the facts has always been deemed one of the most valuable safeguards of the citizen. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." See *Davis v. Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This right of confrontation protects the accused against the peril of conviction by means of ex parte testimony or affidavits given in his absence or when he has no right to cross-examine. *Davis v. Alaska, supra; Nelson v. O'Neil,* 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). As the Supreme Court noted in *Douglas v. Alabama,* 380 U.S. 415 (1965), "[o]ur cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Id.* at 418, Professor Wigmore stated:

> The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 *J. Wigmore, Evidence,* Section 1395 (3d ed 1940) (emphasis in original).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are

tested. The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner is allowed to impeach—to discredit the witness. See, e.g., *Barber v. Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); *Chambers v. Mississippi,* 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Nelson v. O'Neil,* 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971).

It is respectfully submitted that the failure by the Government to produce Rubio-Fernandez in order to testify about his conversations with the defendant and the introduction of taped transcripts in lieu thereof, violated the defendant's right to cross-examine Rubio-Fernandez as to these conversations, and deprived the defendant of his right to pursue his defense of entrapment. The trial court refused to instruct the jury on the entrapment. *Entrapment was the defendant's primary defense.*

The trial court judge ruled that the dsefendant was not entitled to have an entrapment demonstrated. *However, the failure to demonstrate the defense of entrapment was solely due to the Government's failure to produce Rubio-Fernandez. Upon cross-examination of this witness,* the defense of entrapment could have been proved.

For the reasons referred to hereinabove, it is respectfully submitted that a new trial be ordered.

B. It was Reversible Error to Introduce Into Evidence Testimony and Transcripts of the Defendant's Telephone Conversations With Rubio-Fernandez.

18 U.S.C. §2511(c) and (d) provide that it shall not be unlawful for a person to intercept a wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. The Government never established that the consent of Rubio-Fernandez was obtained in order to lay the foundation for admitting tapes containing Rubio-Fernandez' voice and that of Vila and other co-defendants. The only evidence produced by

the Government was the hearsay statement by one of the Government agents that Rubio-Fernandez had told him that he consented. It is respectfully submitted that the hearsay statement by one of the Government's agents that a party to the conversation had given his prior consent was not a proper foundation for the introduction of the taped transcripts of said conversations. The consent by one of the parties to the conversations cannot be established by a mere hearsay declaration. Consequently, the introduction of the taped transcripts was illegal and it is respectfully submitted that a new trial shoulds be granted.

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT JUDGE TO GIVE A SECOND MODIFIED ALLEN CHARGE TO THE JURY.

It is respectfully submitted that the trial court judge improperly gave a second modified *Allen* charge and that the giving of said second charge was coercive and prejudicial and a denial of the defendant's right to trial with due process of law.

Although the prime objective underlying the principle of trial by jury in criminal prosecutions is the unanimous determination of a defendant's guilt or innocence by an impartial panel of his peers, the possibility of irreconcilable disagreement among the members of a jury is very real. Trial judges have long sought to avoid the problems and inconveniences resulting from deadlocked juries. The use of a supplemental charge to encourage deadlocked juries to arrive at a verdict was first approved by the United States Supreme Court in *Allen v. United States,* 164 U.S. 492 (1896). There the Court ruled that a trial court judge may urge jurors, particularly those in the minority, to reconsider the evidence in light of the opinions held by the other jurors and to agree on a unanimous verdict if one could be achieved without sacrificing conscientiously held convictions.

The initial widespread acceptance of the *Allen* charge by the courts has led to innumerable variations on the traditional form. As a result of these variations, courts have been made

aware of the potential for jury coercion. Even when carefully circumscribed, the *Allen* charge itself imports a certain degree of coercive impact. The open appeal to minority jurors to reconsider their views in light of the majority position creates the real danger of acquiescence to "majority rule". See *Green v. United States,* 309 F. 2d 852, 854 (5th Cir. 1962); *Rhodes v. United States,* 282 F. 2d 59, 63 (4th Cir.), *cert. denied,* 364 U.S. 912 (1960). Consequently, the use of the *Allen* charge creates the serious potential of compromising a defendant's constitutional rights to due process and trial by a fair and impartial jury. Any charge to the jury which in effect coerces a juror to concur with the majority not only contravenes the notion of an impartial jury, but forces a verdict in which some jurors are not convinced beyond a reasonable doubt. *United States v. Fioravanti,* 412 F. 2d 407, 418 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). Moreover, even if an attempt is made to neutralize the possibility of a verdict based on less than unanimity, use of the *Allen* charge still creates the substantial risk that full and free jury discussion will be deferred, prejudicing the accused's right to be saved from conviction by a deadlocked jury.

Although the use of an *Allen* charge has never been found coercive on its face, a number of state and federal courts, reflecting the growing discontent with the *Allen* charge, have taken steps to proscribe or limit its use. Thus, in *United States v. Seawell,* 550 F. 2d 1159 (9th Cir. 1977), the Ninth Circuit of the United States Court of Appeals ruled the following:

> We have . . . recognized that even in its most acceptable form, the *Allen* charge "approaches the ultimate permissable limits". *Sullivan v. U.S.,* 414 F. 2d 714, 716 (9th Cir. 1969). *We conclude that permitting it to be given twice in a federal prosecution would be an unexpansion of its use.*

550 F. 2d at 1162-63 (emphasis supplied). See also *United States v. Weiner,* 578 F. 2d 757, 765 n. 4 (9th Cir. 1978).

The Ninth Circuit reasoned in *Seawell* that if the *Allen* charge is to be an instruction on the law, there is little need to repeat it

except at the jury's request. The Court reasoned that:

> Repetition of the charge, together with rejection of the jury's second report of deadlock, is almost certain to convey the thought that by failing to come to an agreement—by once again reporting themselves at impasse—the jurors have acted contrary to the earlier instruction as that instruction was properly to be understood . . . Given a second time, not at the request of the jury, but at the instance of the judge, the charge no longer serves as an instruction; no matter how it may be softened it becomes a lecture sounding in reproof.

550 F. 2d at 1163.

It is true that generally, the test of whether a supplemental instruction to a jury is in error is to consider all the circumstances to determine if the instruction was coercive or prejudicial. See, e.g. *Jenkins v. United States,* 380 U.S. 445, 446, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965). Nevertheless, pragmatic considerations should preclude the application of this test when an *Allen* charge is given more than once. First, a case by case approach would provide little guidance, if any, to the trial court judge. Second, defendants would always face the insurmountable difficulties in attempting to show prejudice. Finally, because a single *Allen* charge stands at the crossroads of impermissable coercion, the protection of a defendant's right to an impartial jury compels a per se rule.

For the reasons referred to hereinabove, it is respectfully submitted that a new trial should be ordered.

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED IF TEH INDICTMENT WAS WHOLLY SUPPORTED UPON HEARSAY TESTIMONY WITHOUT JUSTIFICATION THEREFOR.

In *United States v. Costello,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956) the Supreme Court held that an indictment could be based exclusively on hearsay. Notwithstanding this im-

pramutur, the Court of Appeals for the Second Circuit in *United States v. Umans,* 368 F. 2d 725 (2d Cir., 1966) sought to discourage the practice. While the Court in that case rejected a claim that a hearsay based indictment should fall it stated:

> "that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford the innocent.
>
> Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." Id. at p. 730.

Even before *Umans, supra,* Judge Friendly had condemned the practice in a dissent in *United States v. Payton,* 363 F 2d 996 (2d Cir., 1966). In both *Umans* and *Payton,* however, the criticism was levelied a the misuse of hearsay evidence by misleading the grand jury into believing it was listening to witnesses with personal knowledge when in fact it was receiving second hand evidence.

In *United States v. Beltram,* 388 F. 2d 449 (2d Cir., 1968), however, there was no allegation that a deception had been practiced. The claim was merely that the indictment had been founded upon hearsay testimony. The Court of Appeals refused to dismiss the indictment and, again, a dissent was registered. Id. at p. 451.

The majority in *Beltram, supra,* however noted that this pracice had been judicially criticized by the Second Circuit, but also noted that "[t]he indictment in the present case was returned before the issuance of *Umans, supra.*" *Beltram, supra,* at p. 451.

In *United States v. Catino,* 403 F. 2d 491 (2d Cir. 1968) the claim was made again that an indictment should be dismissed because hearsay was the sole basis for an indictment, and again

the Court refrained from dismissing the indictment. The Court however reaffirmed its criticism of the use of unnecessary and excessive hearsay testimony in the presentation of government cases to grand juries, but because these indictments were returned less than a week after the decision in *Umans*, . . . it would be an unduly harsh exercise of supervisory powers to impose sanctions upon the government for failing to achieve full compliance in this case." *Catino, supra,* at p. 497.

In *United States v. Arcuri,* 405 F. 2d 691 (2d Cir., 1968) Judge Friendly stated that "the reference [to *Umans, supra,* in *Beltram, supra*] . . . suggests [the majority] thought the court's dictum there [in *Umans*] might have announced a standard to govern the subsequent conduct of Federal prosecutors in this circuit." *Arcuri, supra,* at p. 693. The Court again refrained from dismissing the indictment [i]n light of the precedents . . . We repeat, however, the warnings to prosecutors given in *Umans* and *Catino.*" Id. at 694.

In *United States v. Estepa,* 471 F. 2d 1132 (2d Cir. 1972) the practice of misleading grand juries with hearsay testimony led to the dismissal of the indictment. The Court noted that it had

> "previously condemned the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on the testimony of the law enforcement officer who knew the least rather than subject the other officers, or himself, to some minor inconvenience (citations omitted), even if the motivation was merely this rather than the more sinister reason suggested in *United States v. Borelli, infra.*" *Estepa, supra,* at p. 1135.

In *United States v. Ramirez,* 482 F. 2d 807 (2d Cir., 1973) the Court of Appeals limited "the Estepa rule" to cases where deception was involved but not without listing the number of times it had warned against the use of unnecessary hearsay evidence.

In *United States v. Burse*, 531 F.2d 1151 (2d Cir., 1976) the Court of appeals rejected a claim that a hearsay based indictment should fall on authority of *Estepa, supra.* The now familiar warning was once more set forth:

"However, this contention is also one which cannot be dismissed lightly. This court has repeatedly indicated that indictments based on hearsay are disfavored and that it is preferable for grand juries to be presented with first hand evidence. (*Catino, supra,* and *Umans, supra*).

While there are instances where it is justified to present hearsay evidence to the grand jury, the record from the court below fails to disclose any valid reason why the grand jury . . . could not have been given first-hand testimony. The use of hearsay under such circumstances inevitably creates questions which, if possible, are best avoided . . ." *Burse, supra,* p. 1156.

Notwithstanding these warnings, the Government has chosen to continue the practice of presenting unnecessarily hearsay evidence before the grand jury. It is anticipated that the Government will argue that no holding of the Second Circuit requires them to submit first hand evidence where it is available. To make such an argument, however, is to ignore the fact that *Estepa* was the response by the Second Circuit to the Government's wilful disobedience to previously issued warnings about hearsay in another context.

Until such time as the Constitution is amended to abolish the Grand Jury system, the purpose for its requirement as shield between the citizenry and the government should not be circumvented by prosecutors who use the Grand Juries as puppets to do their bidding.

The excessive use of hearsay before a grand jury without any justification therefor, violates the spirit and intent of the Constitution and must be prohibited.

Accordingly, the indictment herein being based solely upon hearsay testimony without any justification therefor, should be deemed legally insufficient and the conviction of the defendant should be reversed.

MISCLASSIFICATION OF COCAINE DENIES THE DEFENDANT DUE PROCESS OF LAW AND RESULTS IN CRUEL AND UNUSUAL PUNISHMENT

Defendant Vila has been convicted for violations of 21 U.S.C. §§841(a)(1) and 846 involving an alleged conspiracy to distribute cocaine and the actual distribution of cocaine. The conviction should be revesed on the ground that the misclassification of cocaine as a narcotic is irrational and denies equal protection in violation of the Fifth Amendment to the United States Constitution.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801-966, classifies certain "controlled substances" into five "schedules." These substances are grouped according to their potential for abuse, their medical usefulness, and the consequences of their use or abuse. 21 U.S.C. §812(b). Cocaine is a Schedule II substance. 21 U.S.C. §812(c), Schedule II (a)(4). Placement of a substance on one schedule or another determines the regulatory scheme applicable to that substance, see, e.g., 21 U.S.C. §§823-827, 842-43. Criminal sanctions, however, sometimes vary within schedules and across schedule lines. '841(b)(1) divides Schedule II substances into two groups for criminal purposes: those which are "narcotic drugs", 21 U.S.C. §841(b)(1)(A) and those which are not, 21 U.S.C. §841(b)(1)(B). The maximum penalty for violations involving the former is imprisonment for 15 years and a fine of $25,000; for the latter the maximum penalty is far less: imprisonment for 5 years and a $15,000 fine. The term 'narcotic drug", as defined in 21 U.S.C. §802(16) includes opium and the opiates, coca leaves, and their derivatives, compounds and chemicaVanalogs. With the sole exception of cocaine, all these substances are true narcotics. The only schedule II substance which is not a "narcotic drug" within the meaning of §802(16) is injectable methamphetamine (methedrine or "speed"). Methedrine, like cocaine, is a central nervous system stimulant. Other stimulants besides cocaine and methedrine are

listed in Schedule III, 21 U.S.C. §812(c), Schedule III(a).

Despite the statutory definition, cocaine is *not* a narcotic; it is a central nervous system stimulant. The effect of cocaine on the user's nervous system is similar to that of the amphetamines, rather than that of "true" narcotics like heroin. In contrast to narcotics, cocaine does not cause physical or psychological dependence even when used often in large doses. Nor does it precipiate the medical complications often caused by narcotic use. Cocaine use thus does not affect an individual's normal life pattern.

Similarly, the serious social disruptions widely attributed to narcotic use, are not occasioned by cocaine use. Since cocaine is not addictive, users do not need to commit crimes in order to afford their perpetually increasing need for the drug. Cocaine use does not lead to the abnormal life patterns which narcotics addicts fall into; cocaine users can and do hold steady jobs and make significant contributions to society.

Although several affidavits of medical doctors, drug researchers, professors and a former assistant commissioner for addiction programs for the New York City Health Services Administration, all attesting to the fact that cocaine is not a narcotic drug were submitted to the trial court and reviewed again by the Court of Appeals for the Second Circuit, they were disregarded on the basis that if Congress wants to classify a "cow" as a type of "horse" it is within its right to do so. This is unfair and unconstitutional.

In an "in depth" study of the history behind the misclassification of cocaine presented to both the District Court and the Court of Appeals it was shown that the use of cocaine as a stimulant and antedote for hunger and fatigue by the Andean Mountain Indians dates back thousands of years, continuing to the present among approximately 90% of the Indians. R. Lungeman, *Drugs from A to Z:* A Dictionary, 43 (1969). This alone distinguishes cocaine from narcotics which are addictive sedatives.

In the 19th Century Dr. Sigmund Freud wrote that he took cocaine in ". . . small doses regularly against depression and against indigestion, and with a most brilliant success". E. Jones, *The Life and Work of Sigmund Freud,* Chap. VI, pp. 1-3 (New York, 1956).

Without reiterating the entire volumous argument presented to the Courts below, it is necessary to point out that cocaine was an important ingredient in coca-cola and was sold by the Parke Davis Company in Coca-leaf cigarettes and cigars as well as in a liquor like mixture called coca-cordial. See: E.G. Kahn, *The Big Drink: The Story of Coca-Cola* (N.Y. 1960); and Masto, *The American Disease.*

Perhaps the most significant factor in its incorporation into the Harrison Act is the racial mythology that was accorded to cocaine at that time. ". . . the stimulation of negroes, who are largely addicted to this drug, to a certain class of crime. Most attacks upon white women of the south, are the direct result of a coke-crazed . . . brain" Moffat, *RX-Cocaine,* Hampton Magazine, May, 1914, p. 604. See also Wright, *Report on the International Opium Commission,* 58 Senate Documents 377 (61st Congress, 2nd Session, 1909-10, pp. 48-51) wherein it was stated:

> ". . . it [cocaine] has been a potent incentive in driving the humbler negroes all over the country to abnormal crimes".

In an era when the Ku Klux Klan was in its "hey day" and Black Americans just emerging from their slave status, the unquestioned acceptance by Congress of the proposition that cocaine turned "humbler negroes" into "sex crazed defilers of white womenfolk" guaranteed that cocaine would be included into the list of "Dangerous Drugs".

While the passage of the Harrison Act had to wait for the mythology which was the underlying motivating force in the heavy criminalization of cocaine was never challenged in a subsequent legislative hearing. In 1915 an "Act of Regulate this Practice of Pharmacy and the Sale of Poison in the Consular

District of the United States in China" was passed. That Act prohibited the sale of cocaine, opium and morphine to "habitual users" of the drugs. An exception written into that statute permits any doctor to furnish "in good faith for any habitual user of narcotic drugs who is under his professional care, such substances as he may deem necessary for their treatment . . ." (38 Stat. 817, 820). The wording of the statute indicates how far back the erroneous linking of cocaine and opium dates.

In 1922, cocaine was defined as a narcotic drug in an amendment to the Narcotic Drugs Export and Import Act, which banned the importation of cocaine absolutely (42 Stat. 592). There was no Congressional hearing or finding regarding cocaine.

Nothing has occurred in the intervening years since 1922 to correct the misclassification of cocaine as a narcotic drug. The 1970 statute which is the basis of the present prosecutions divides drugs into various categories according to quality. But the definition of narcotic and the corresponding penalty section cuts across the various schedules and places a possible 15 year jail sentence upon all narcotic drug offenses, regardless of schedule. There were no hearings or scientific evidence presented to justify this result concerning cocaine. It was simply assumed from past misinformation that the drug was a narcotic and presented a physiological and social danger corresponding to that evil presented by heroin addiction.

B. The Penalty Structure for Distribution of Cocaine Violates the Defendant's Due Process Rights.

Because the criminal classification of cocaine as a narcotic is without a sufficient rational basis, a conviction under the statutes incorporating this classification would deprive the defendant of liberty without due process of law. Both counts of the indictment charging defendant Vila must therefore be

dismissed.[1]

When Congress first classified cocaine as a "narcotic" for criminal purposes, it relied on certain supposed "facts" and attitudes commonly believed in that era. This original classification has been carried forward to the present law without critical examination or review, and no presently credible factual justification can be advanced to support it. The defendants do not challenge this classification simply because heroin and cocaine are grouped together for penalty purposes.[2]

Certainly, Congress may decree that different or even dissimilar crimes may be punished alike. But the classification must be rational and not arbitrary. Where the reasonableness of the classification cannot be supported *in fact,* as here, the statute must fall. *United States v. Smaldone,* 484 F. 2d 311, 3209 (10th Cir. 1973); cf. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92 (1972).

Cocaine is a stimulant utterly unlike the true narcotics or opiates. Yet none of these differences was considered by Congress when it defined cocaine as a narcotic under the Harrison Act, nor were they considered in the enactment of the criminal statute now in force.

When Congress legislates in reliance on supposed facts which subsequently are revealed to be incorrect, the law which necessarily depends on those facts is unconstitutional. In *Turner v. United States,* 396 U.S. 398, 418-19 (1970), the Supreme Court reversed a conviction for possession of cocaine under the law superseded by the one in question here. "Based on our own

1. Conspiracy to commit the offense charged is punishable by the same penalties prescribed for the substantive offense itself. 21 U.S.C. §846.

2. Thus, this case differs markedly from the many cases attacking the very criminalization of marijuana based on its inaccurate classification as a "narcotic". *See, e.g., English v. Virginia Probation and Parole Board,* 481 F. 2d 188 (4th Cir. 1973); *United States v. Kiffer,* 477 F. 2d 349 (2d Cir.)., *cert. denied,* 414 U.S. 831 (1973); *Rener v. Beto;* 447 F. 2d 20 (5th Cir. 1971), *cert. denied,* 405 U.S. 1051 (1972). At least two state supreme courts, however, have invalidated marijuana statutes in part because of its irrational classification as a "narcotic".

examination of the facts now before us," the Court said, the Congressional determination that all cocaine could be presumed imported, on which the convictions depended, was "more-likely-than-not" incorrect. *Id.* at 419.

Even if the necessary, underlying facts are true when the legislation was passed, but subsequently become untrue, the convictions must be overturned. In *Leary v. United States,* 395 U.S. 6 (1969), the Court reversed a conviction for transportation of illegally imported marijuana. In *Leary*, Congress had legislated a presumption of knowledge of importation based on "facts" once valid, but no longer true at the time of trial. The Court declared:

> [W]e have considered more recent information, in order both to obtain a broader general background and to ascertain whether the intervening years have witnessed significant changes which might bear upon the presumption's validity.
>
> [Fn.] A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to reexamine the factual declarations.

Id. at 38, n. 68. See also, *Abie State Bank v. Bryan,* 282 U.S. 765, 772 (1921); *cf. Brown v Board of Education,* 347 U.S. 483, 494-95 (1954). As shown by the legislative history discussed above, Congressional error in the original and unchanged penal classification of cocaine was not limited to the realm of science. Another element was racial myth and fear founded on exaggerated or untrue accounts of violent crimes committed against white women by drug-crazed black men. Although racially neutral on its face, the law was partly designed for discriminatory application, condemned by the Fifth Amendment. *Cf. Loving v. Virginia,* 388 U.S. 1 (1967); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Even where the law might otherwise be valid, a demonstrably invidious legislative intent will militate against the law's validity. *See United States Dept. of*

Agriculture v. Moreno, 413 U.S. 528 (1973). Racially-motivated differences in penalty provisions cannot be tolerated. *Cf. Furman v. Georgia,* 408 U.S. 238, 242-57 (Douglas, J., concurring, 364-66 (Marshall, J., concurring) (1972).

Although Congress carefully, thoroughly and commendably reorganized the controlled substances law in 1970, it did not reexamine or reform the criminal classification of cocaine at that time or at any other time. No present rationale supports the classification of the cocaine user with the hard core narcotic addict. Because the classification of cocaine as a "narcotic drug" is arbitrary, and discriminates against the defendant invidiously and without a rationale basis in fact, the defendant's indictment based upon the mis-classification should have been dismissed and his conviction thereon reversed.

The misclassification of cocaine violates due process in yet another fashion: by penalizing offenses involving cocaine a stimulant, more harshly than correlative offenses involving other stimulants, the present statutory scheme violates the guarantee of equal protection of the laws.

This guarantee is an essential element of Fifth Amendment due process of law. *Schneider v. Rusk,* 377 U.S. 163, 168 (1964); *Bolling v. Sharpe,* 347 U.S. 497 (1954). Equal protection of the law requires that no different punishment may be imposed of one offender than is statutorily available for imposition on all similarly situated. See, e.g., *Skinner v. Oklahoma,* 315 U.S. 535, (1942); *Hodgson v. Vermont,* 168 U.S. 262, 273 (1897); *Barbier v. Connolly,* 113 U.S. 27, 31 (1885). In the leading case of *Skinner v. Oklahoma, supra,* the Court invalidated a statute requiring the penalty of sterilization for some convicts but not for others similarly situated, relying heavily on its analysis on the threat to the fundamental right to procreate. In the instant case, a fundamental right is also threatened: liberty from physical penal coercion for a possible ten years in excess of the punishment term faced by members of the favored class, amphetamine users.

The Supreme Court has recognized that this right is not merely "fundamental," it is *primary:* "Although the Court has not assumed to define liberty, that term is not confined to mere freedom from bodily restraint." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Furthermore, where rights involved in the criminal process is involved, classifications not otherwise "suspect" are nevertheless treated as such. See., e.g., *Griffin v. Illinois,* 351 U.S. 12 (1956) (criminal process; poverty); *In re Gault,* 387 U.S. 1 (1967) (criminal process; age). For these reasons, this discriminatory classification of cocaine and its distributors compared to other controlled stimulants and their distributors must be carefully scrutinized: "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned." *Skinner v. Okla., supra,* at 544 (Stone, C.F., concurring).

The discrimination cannot survive such scrutiny. There is no compelling justification for treating alleged cocaine distributors differently from alleged amphetamine distributors. Cocaine is, if anything, less dangerous to the user and to his or her community. Its use is necessarily less widespread, because it is legitimately manufactured in far lesser quantities and so is not often diverted to illicit use from legitimate channels, as are the amphetamines. It is no more psychologically addictive than methedrine and has no greater a potential for abuse. The deterrent effect, if any, of an additional ten year penalty cannot be justified.

Even under the less stringent test of "minimum rationality" followed in challenges to the constitutionality of commercial regulations, the discrimination against cocaine users cannot be upheld. By placing cocaine in Schedule II rather than in Schedule I, Congress has recognized its analogy with methedrine (and difference from heroin) in important respects. By penalizing methedrine offenses together with those involving Schedule III substances, Congress recognized that control of all the stimulants involves essentially similar factors. The differen-

tial penalty scheme that selectively removes cocaine from the punishment otherwise applicable, 21 U.S.C. §841(b)(1)(B), is arbitrary and irrational. It punishes like offenders differently without justification. To apply the classification would deprive the defendant of his liberty without due process of law.

The second alternative relief urged by defendant in this case is particularly appropriate to remedy this constitutional violation. If the Court were to require the instant offenses to be punishable under 21 U.S.C. §841(b)(1)(B) with the other stimulants in Schedule II, rather than under §841(b)(1)(A), defendant would have been in precisely the same position vis a vis his potential penalty, as an individual charged with distribution and conspiracy to distribute any other stimulant.

Finally, imposition of a penalty of fifteen years imprisonment for the offenses charged constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Eighth Amendment limits both the amount and the nature of permissible punishment, invalidating a punishment which "is excessive and serves no valid legislative purpose." *Furman v. Georgia,* 408 U.S. 238, 331 (1973).

A punishment may be cruel in its disproportionality in comparison to punishments inflicted for similar crimes. *Weems v. United States,* 217 U.S. 349 (1910). In the case at bar, classification of cocaine as a narcotic has exposed defendant to a punishment of awesome disproportionality. On the basis of a legislative mistake of fact, defendant's penalty for each offense is now 15 years, as opposed to the five years he would have faced had cocaine been properly classified as a stimulant.

To spend fifteen (15) years in prison for a crime which has been erroneously defined, is cruel and unusual treatment and should be corrected by this Honorable Court.

CONCLUSION

The questions presented by this case are a great and recurring significance in the administration of justice as it applies to

defendants in criminal cases, genuinely and specifically to those who have been charged with violations of drug laws involving cocaine. The serious questions of criminal justice and public policy involved herein and the effect of the decision below, if not reversed, upon the historic responsibility of the courts to provide fair and equal justice under the law, make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARTIN J. SIEGEL
Attorney for Petitioner

APPENDIX "A"
INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," HENRY GOMEZ LONDONO, RAMONITA CASADO, a/k/a "Cookie," NARCISCO GUZMAN, a/k/a "Nelson," LOUIS HERNANDEZ, a/k/a "Albertito," NILDA MEDINA, a/k/a "Nellie," PATRICIARODRIGUEZ, JOHN DOE, a/k/a "Samson," and JOHN DOE, a/k/a "Tomas Vila,"

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of March, 1977 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," HENRY GOMEZ LONDONO, RAMONITA CASADO, a/k/a "Cookie," NARCISCO GUZMAN, a/k/a "Nelson," LUIS HERNANDEZ, a/k/a "Albertito," NILDA MEDINA, a/k/a "Nellie," PATRICIA RODRIGUEZ, JOHN DOE, a/k/a "Samson," and JOHN DOE, a/k/a "Tomas Vila," the defendants and

others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On August 3, 1977, in Ponce, Puerto Rico, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," met with a confidential informant of the Drug Enforcement Administration who was acting in an undercover capacity (hereinafter referred to as "the confidential informant") in order to discuss a sale of narcotics.

2. On August 4, 1977, in Ponce, Puerto Rico, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," again met with the confidential informant in order to discuss a sale of narcotics.

3. On August 6, 1977, in Ponce, Puerto Rico, the confidential informant was given the New York City telephone number of JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," by PATRICIA RODRIGUEZ, who advised the confidential informant not to mention drugs on the telephone and to talk in code.

4. During a telephone conversation on August 9, 1977, in the Bronx, New York, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," arranged to meet the confidential informant at a Holiday Inn on West 57th Street, New York, New York (hereinafter referred to as "Holiday Inn").

5. On August 9, 1977, NILDA MEDINA, a/k/a "Nellie," drove to the vicinity of 3155 Rochambeau Avenue, Bronx, New York and picked up JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager."

6. On August 9, 1977, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," and NILDA MEDINA, a/k/a "Nellie," drove to the Holiday Inn in order to meet with the confidential informant, a special agent of the Drug Enforcement Administration and a police officer of the Puerto Rico Police Department (hereinafter collectively referred to as "the undercover agents"), who were posing as prospective purchasers of narcotics.

7. On August 9, 1977 in a room at the Holiday Inn, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," in the presence of NILDA MEDINA, a/k/a "Nellie," negotiated with the undercover agents for the sale of one kilogram of cocaine for $30,000.

8. On August 10, 1977, at a Mobil Service Station in Queens, New York, while in the presence of NARCISCO GUZMAN, a/k/a "Nelson," HENRY GOMEZ LONDONO and JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," had a conversation.

9. On August 10, 1977, at a Mobil Service Station in Queens, New York, while in the presence of HENRY GOMEZ LONDONO and NARCISCO GUZMAN, a/k/a "Nelson," JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," placed a telephone call to the undercover agents at the Holiday Inn in order to advise the undercover agents that he (VILA) would deliver an additional kilogram of cocaine to them on consignment.

10. On August 10, 1977, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," and NARCISCO GUZMAN, a/k/a "Nelson," drove to the Holiday Inn.

11. On August 10, 1977, JOHN DOE, a/k/a "Samson," joined JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," and the undercover agents in a room at the Holiday Inn.

12. On August 10, 1977, in a room at the Holiday Inn, while in the presence of JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," JOHN DOE, a/k/a "Samson," delivered approximately one and one-half kilograms of cocaine to the undercover agents.

13. On August 10, 1977, in a room at the Holiday Inn, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," received $30,000 from the undercover agents as the purchase price for one kilogram of cocaine.

14. On August 11, 1977, in the Bronx, New York, LUIS HERNANDEZ, a/k/a "Albertito," in a telephone conversation with one of the undercover agents, discussed the quantity of cocaine which had been delivered on consignment to the undercover agents by JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," and JOHN DOE, a/k/a "Samson."

15. On August 17, 1977, on Ponce, Puerto Rico, PATRICIA RODRIGUEZ and JOHN DOE, a/k/a "Tomas Vila," received $5,000 from the undercover agents as partial payment for one-half kilogram of cocaine.

16. On August 18, 1977, in Ponce, Puerto Rico, PATRICIA RODRIGUEZ and JOHN DOE, a/k/a "Tomas Vila," received $5,000 from the undercover agents as partial payment for one-half kilogram of cocaine.

17. On August 29, 1977, PATRICIA RODRIGUEZ received $4,000 from the undercover agents as partial payment for one-half kilogram of cocaine.

(Title 21, United States Code, Section 846).

COUNT TWO

The Grand Jury further charges:

On or about the 10th day of August, 1977 in the Southern District of New York, JAIME VILA, a/k/a "Jimmy," a/k/a "Teenager," HENRY GOMEZ LONDONO, RAMONITA CASADO, a/k/a "Cookie," NARCISCO GUZMAN, a/k/a "Nelson," LUIS HERNANDEZ, a/k/a "Albertito," NILDA MEDINA, a/k/a "Nellie," PATRICIA RODRIGUEZ, JOHN DOE, a/k/a "Samson," and JOHN DOE, a/k/a "Tomas Vila," the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II

narcotic drug controlled substance, to wit, approximately one and one-half kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United Sttes Code, Section 2).

Foreman

ROBERT B. LISKE, JR.
United States Attorney

APPENDIX "B"
U.S. COURT OF APPEALS OPINION AFFIRMING CONVICTION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 843, 844, 847—August Term, 1978.

(Argued April 4, 1979 Decided May 1, 1979.)

Docket Nos. 79-1007, 1008, 1009

UNITED STATES OF AMERICA,

Appellee,

—against—

JAIME VILA, NARCISCO GUZMAN, and LUIS HERNANDEZ,

Defendants-Appellants.

Before:

MULLIGAN, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Pierre N. Leval, Judge, after a jury trial, for violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. § 2.

Affirmed.

JAMES A. MOSS, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Howard W. Goldstein, Assistant United States Attorney, of Counsel), *for Appellee.*

HARVEY J. MICHELMAN, Esq., New York, N.Y. (Michelman & Michelman, New York, N.Y., Jon M. Probstein, of Counsel), *for Defendant-Appellant Vila.*

DAVID S. ZAPP, Esq., New York, N.Y. (Jon M. Probstein, of Counsel), *for Defendant-Appellant Hernandez.*

PHILIP R. EDELBAUM, Esq., New York, N.Y., *for Defendant-Appellant Guzman.*

MULLIGAN, *Circuit Judge:*

Jaime Vila, Narcisco Guzman and Luis Hernandez were convicted by a jury after a trial before the Hon. Pierre N. Leval, United States District Judge, Southern District of New York, of conspiracy to distribute, and to possess with intent to distribute, heroin and cocaine, in violation of 21 U.S.C. § 846, and of distributing approximately one and one-half kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. Vila, Guzman and Hernandez were sentenced to and are presently serving concurrent prison terms of fifteen, nine and two and one-half years, respectively, to be followed by special parole terms of twenty, five and five years, respectively. Vila was also fined $20,000 on each count.

I

The evidence at trial established that Jaime Vila organized and supervised a widespread narcotics enterprise whose members possessed and distributed substantial quantities of heroin and cocain in New York City and in California from late 1975 through late 1977. The Government's case focused on the involvement of Vila and eight members of his organization in the distribution of one and one-half kilograms of cocaine on August 10, 1977. The proof established a narcotics network with activities controlled by Vila in New York, California and Puerto Rico. Vila and his associates smuggled large quantities of heroin from Tijuana, Mexico into Los Angeles, California, where it was processed and then flown to New York City for distribution. Members of Vila's organization also sold wholesale quantities of cocaine, according to the instructions of Vila, in New York City and Los Angeles. Payments for the narcotics sales were made to Vila's associates both in New York and in Puerto Rico. Part of the proceeds were used to purchase real estate in Puerto Rico and Florida and to invest in businesses in Puerto Rico and the Bronx.

II

Appellants present numerous issues for review, most of which are frivolous and may be disposed of summarily. Appellants Vila and Hernandez contend that the destruction of rough notes taken by New York City Police Detective Raymond Vallely during debriefing sessions of one of the Government witnesses, Sonny Perlman, constituted a willful suppression by the Government of evidence favorable to appellant within the meaning of *Brady v. Mary-*

land, 373 U.S. 83 (1963). We disagree. Appellants never made this claim in the district court and cannot raise it here. See *United States v. Braunig,* 553 F.2d 777, 780-81 (2d Cir.), *cert. denied,* 431 U.S. 959 (1977). In addition, as appellants acknowledge, before they may be viewed as *Brady* material, the rough notes taken by Detective Vallely must be capable of *substantially* impeaching the credibility of Perlman. See *Giles v. Maryland,* 386 U.S. 66 (1967); cf. *United States v. Miller,* 411 F.2d 825 (2d Cir. 1969) (Jencks Act). The uncontradicted testimony of Detective Vallely established that the notes were virtually consistent with Perlman's final debriefing statement[1] and with his trial testimony. The mere fact that Perlman's recollection of dates and meetings improved from one debriefing session to the next could not have been used to substantially impeach his credibility.

Appellant Vila argues that his Sixth Amendment right to a speedy trial was abridged becaue he was not brought to trial within such period of time as was "reasonable under the circumstances."[2] Vila was brought to trial in the Southern District of New York on March 20, 1978, 126 days after his arrest in Los Angeles. The relevant provisions of the Speedy Trial Act were not violated since Vila's trial took place within 120 days of his arraignment. 18 U.S.C. § 3161(b), (c), (f) and (g). With respect to appel-

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1 Two preliminary debriefing statements were prepared. The first was prepared by Detective Vallely based on his memory and rough notes taken during the debriefing sessions with Perlman. The second and third drafts were based on the first and contained the editorial comments of Detective Vallely's supervisor and the Assistant United States Attorney in charge of the case. The third and final draft was the only one read and signed by Perlman.

2 Appellants' Joint Brief at 14.

lant's Sixth Amendment right, the Supreme Court has held that "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" are factors to be considered in speedy trial cases. In the instant case, the delay was shorter than in other cases where no Sixth Amendment violation was found. *Barker v. Wingo,* 407 U.S. 514, 533 (1972) ("well over five years"); *United States v. Lane,* 561 F.2d 1075, 1078 (2d Cir. 1977) ("approximately 58 months"); *United States v. Saglimbene,* 471 F.2d 16, 17 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (six years). According to the record, the original trial date was adjourned at the request of Vila's attorney in order to permit the defense more time to prepare for trial and in order to hold suppression hearings. Finally, Vila has been able to show no prejudice as a result of the delay. Thus, we conclude that Vila's Sixth Amendment right to a speedy trial has not been violated.

Appellant Vila also contends that the delay in removing him from California to New York after his arrest violated the Speedy Trial Act, 18 U.S.C. §§ 3161(c), (f). The facts of this contention are fully set forth and properly disposed of in the district court's memorandum opinion below (77 Crim. 767 (S.D.N.Y. March 6, 1978)). Vila's arraignment took place well within the statutory period and he was not deprived of the right to the effective assistance of counsel by the delay in his removal from California. The record establishes that Vila was represented by counsel during the period pending his removal from California and was granted additional time to consult an attorney and prepare for trial once he arrived in New York.

We also find that the Sixth Amendment right of appellants Vila and Hernandez to confront the witnesses against

them was not abridged by the failure of the Government to produce informer Jorge Rubio as a witness. Both Vila and Hernandez opposed the Government's motion for permission to reopen its rebuttal case in order to call Rubio. In addition, neither appellant called Rubio as a witness when he was available.

III

With respect to appellant Guzman's claims, the Government's evidence was strong enough to establish both his knowledge of and participation in the crimes charged in the indictment. Further, Guzman's argument that the proof at trial established two distinct conspiracies, one operating between New York City and California and the other operating between Puerto Rico and New York City is unpersuasive. As this court noted in *United States v. Armedo-Sarmiento,* 545 F.2d 785, 790 (1976), cert. denied, 430 U.S. 917 (1977), "a single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis in its locale of operations." (citations omitted). The evidence viewed in the light most favorable to the Government established a single narcotics distribution organization with a common source of supply, a central leadership, and a consistent pattern of operation.

We also reject Guzman's claim that the trial court improperly refused to instruct the jury, in accordance with our decision in *United States v. Garguilo,* 310 F.2d 249, 254 (1962), that no defendant may be convicted of a crime unless the jury is convinced beyond a reasonable doubt that the defendant "was doing something to forward the crime—that he was a participant rather than merely a knowing spectator." A review of the record

establishes that the trial judge twice instructed the jury that the mere presence and guilty knowledge on the part of a defendant would not suffice to convict unless the defendant somehow promoted the venture.

Appellants Vila and Hernandez challenge here the district court's charge to the jury regarding juror bias on the grounds that it constituted a second modified *Allen* charge. According to the record, after returning partial verdicts acquitting four of the eight defendants, the jury reported an impasse to the trial court in a note which also suggested that not every juror was deliberating in accordance with the jurors' oaths. The trial court, after consulting with counsel for the Government and all remaining defendants, called the jury back into the courtroom, reminded them of the questions they were asked during *voir dire* in order to eliminate juror bias, and admonished them not to allow considerations of bias or prejudice to prevent them from reaching a verdict. A modified *Allen* charge had been delivered to the jury previously when they informed the court of a deadlock.

Appellants' challenge to the trial judge's remarks is meritless. The attorneys for both Vila and Hernandez expressly consented to the charge on juror bias before it was made and failed to object when it was delivered to the jury. In addition, the remarks at issue may not be interpreted as a second modified *Allen* charge since they merely constitute a reminder to the jury to avoid possible bias and prejudice in executing their sworn responsibilities.

Appellant Guzman contends that the district court erred in admitting a tape recording of, and testimony concerning, conversations in which defendant Hernandez discussed with an undercover agent the murder of a co-conspirator and associate of Vila, presumably by someone

outside the Vila organization. The declarations of Hernandez were properly admitted as statements of a coconspirator under Fed. R. Evid. 801(d)(2)(E). The trial judge did not abuse his broad discretion under Fed. R. Evid. 403 finding that the probative value of the evidence outweighed the prejudicial impact, see *United States v. Robinson,* 560 F.2d 507 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978), especially since the conversations do not indicate that a crime had been committed by a coconspirator of Guzman, but rather by someone not associated with the Vila organization.

Appellants Vila and Hernandez contend that the use of hearsay in the grand jury was grounds for dismissal of the indictment. We disagree. The trial judge examined the minutes of the grand jury proceeding *in camera* and properly applied the test enunciated by this court in *United States v. Estepa,* 471 F.2d 1132, 1137 (1972) and *United States v. Marchand,* 564 F.2d 983, 1001 n.29 (1977), cert. denied, 434 U.S. 1015 (1978). Appellants have failed to show any deception of the grand jury. The record supports the trial court's conclusions that the grand jury was specifically told that it was hearing hearsay testimony and that even if it heard the testimony of first hand witnesses, there was no probability that a different result would have been reached.

IV

Finally, appellants assert that Congress' classification of cocaine as a Schedule II narcotic drug under 21 U.S.C. § 802(16) is without rational basis and is therefore a violation of their Fifth Amendment due process and equal protection guarantees. Numerous courts have already considered this issue and have all rejected appellants' posi-

tion. We agree that Congress had a rational legislative purpose under the standard set forth in *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938), when it classified cocaine as a Schedule II narcotic drug for the purpose of imposing penalties. *United States v. Marshall*, 532 F.2d 1279, 1287-88 (9th Cir. 1976); *United States v. Harper*, 530 F.2d 828 (9th Cir.), cert. denied, 429 U.S. 820 (1976); *United States v. Smaldone*, 484 F.2d 311, 319-20 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974). In sum, we agree with *United States v. Brookins*, 383 F. Supp. 1212 (D.N.J. 1974), aff'd, 524 F.2d 1404 (3d Cir. 1975), where the court stated:

> Whether Congress retained the "narcotics" classification because of the paucity of scientific data concerning the use and effect of cocaine, or because it is used by drug abusers either alone or in combination with heroin, or in furtherance of treaty obligations, *see* 21 U.S.C. Sec. 801(7), there are any number of rational bases which, if now known, can be assumed under the *Carolene* test in upholding the congressional classification of cocaine as a narcotic for penalty purposes.

383 F. Supp. at 1216.

Appellants Vila and Hernandez also contend that classification of cocaine as a narcotic has exposed them to a maximum sentence of fifteen years under 21 U.S.C. § 841(b)(1)(A) constituting cruel and unusual punishment forbidden by the Eighth Amendment. We hold that the maximum punishment established by Congress is not so "disproportionate to the gravity of the crime committed," *Carmona v. Ward*, 576 F.2d 405, 408 (2d Cir. 1978), cert.

denied, 99 S.Ct. 874 (1979) that it violates the Eighth Amendment. All other issues raised by appellants are even less meritorious and deserve no comment.

The convictions are affirmed.